Supreme Court, U.S.
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No. 01 144

IN THE

Supreme Court of the United States

FULTON COUNTY, GEORGIA, *et al.*,
Petitioners,

v.

FLANIGAN'S ENTERPRISES, INC. OF GEORGIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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82 pp

QUESTIONS PRESENTED

I. Before enacting an ordinance that seeks to address negative secondary effects associated with adult entertainment establishments, must a local government await actual development of such negative secondary effects within its jurisdiction, or may the local government legislate in a preventative fashion based upon evidence of such negative secondary effects from other local government jurisdictions?

II. Where a local government relies upon judicially approved studies from other jurisdictions indicating that negative secondary effects are associated with adult entertainment establishments, does a resulting local government ordinance that prohibits the service or consumption of alcohol at adult entertainment establishments violate the First Amendment because studies specific to that local government's jurisdiction did not indicate negative secondary effects associated with such establishments?

LIST OF PARTIES & RULE 29.6

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit whose judgment is sought to be reviewed:

Fulton County, Georgia,
Appellee Below.

The Board of Commissioners of Fulton County, Georgia,
Appellee Below.

Mitch Skandalakis,
Appellee Below.

Nancy Boxill,
Appellee Below.

Gordon Joyner,
Appellee Below.

Robert Fulton,
Appellee Below.

Tom Lowe,
Appellee Below.

Emma Darnell,
Appellee Below.

Michael Hightower,
Appellee Below.

Flanigan's Enterprises, Inc. of Georgia,
Appellant Below.

6420 Roswell Road, Inc.,
Appellant Below.

Harry Freese,
Appellant Below.

Fannies, Inc.,
Appellant Below.

LIST OF PARTIES & RULE 29.6—Continued

William H. Parks, Jr.,
Appellant Below.

Ceeda Enterprises, Inc,
Appellant Below.

Pursuant to Rule 29.6, Petitioners state that the named Petitioners do not have any corporate parent, subsidiary, or affiliate that is publicly held.

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PETITION FOR A WRIT OF CERTIORARI

Fulton County, Georgia, and its elected Board of Commissioners, (hereinafter "Fulton County"), through undersigned counsel, respectfully request that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit that reversed, in significant part, the decision of the United States District Court for the Northern District of Georgia granting Fulton County's motion for summary judgment. Fulton County shows to this Court that the Eleventh Circuit has entered a decision in conflict with 1) prior decisions of this Court, as well as prior decisions of the Eleventh Circuit, and 2) decisions of other United States Courts of Appeals, including the Third, Fourth, Seventh and Eighth Circuits. Additionally, this Court has recently agreed to review a similar decision by the Ninth Circuit Court of Appeals. *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000), *cert. granted*, __ U.S. __, 121 S.Ct. 1223 (March 5, 2001) (Docket No. 00-799).

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 242 F.3d 976 and is reprinted at Pet. App. 1a-23a. The order of the District Court granting summary judgment in favor of Fulton County is reprinted at Pet. App. 24a-43a. The Court of Appeals' order denying Fulton County's petition for rehearing *en banc*, to be published in a table at __ F.3d __, is reprinted at Pet. App. 44a-45a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 20, 2001. *See* Pet. App. 1a. A timely petition for rehearing *en banc* was denied by the Court of Appeals on April 23, 2001. *See* Pet. App. 44a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND LOCAL ORDINANCE PROVISIONS INVOLVED

This case involves the following constitutional provision, the pertinent portion of which is set forth below:

> Congress shall make no law . . . abridging the freedom of speech . . . .

U.S. CONST. amend I.

This case also involves the following Fulton County, Georgia ordinance provision, the pertinent portions of which are set forth below:

> Any person, firm, partnership, or corporation licensed hereunder shall comply with the following rules and regulations pertaining to the operation of the adult entertainment establishment:
>
> . . .
>
> (7) No licensee shall permit any alcoholic beverages to be served, offered, or consumed on the premises.

Fulton County (Georgia) Code of Laws, § 18-76, as amended December 17, 1997. *See* Pet. App. 46a-50a.

STATEMENT OF THE CASE

The present case stems from the enactment of a December 17, 1997 amendment to Fulton County Code of Laws § 18-76, which amendment prohibited the serving, offering or consumption of alcohol at clubs offering live nude, or partially nude, performances (hereinafter "adult entertainment establishments" or "adult entertainment clubs").[1] *See* Pet.

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[1] By reference to the Fulton County Zoning Resolution, Fulton County's adult entertainment licensing ordinance defines "adult entertainment" as "[p]ermitting, performing, or engaging in live acts (1) of touching, caressing, or fondling of the breasts, buttocks, [] anus, vulva, or genitals, (2) of displaying of any portion of the areola of the female breast,

App. 49a. The above-referenced amendment is hereinafter referred to as "the Fulton County Ordinance" or "the Ordinance". In adopting the Ordinance, Fulton County considered studies from other local governments throughout the United States, which demonstrated that negative secondary effects are associated with adult entertainment establishments. *See* Pet. App. 5a, 47a. Additionally, Fulton County considered studies of crime statistics and property values around the existing adult entertainment establishments in Fulton County; however, those studies did not identify then-existing negative secondary effects associated with those specific establishments. *See* Pet. App. 3a-5a, 46a-47a. The Eleventh Circuit ruled that the Fulton County Ordinance violated the Respondents' free speech rights under the First Amendment to the U.S. Constitution, in that the Ordinance failed to satisfy the second prong of the *United States v. O'Brien* test for content-neutral regulations (i.e., the regulation must further a substantial government interest). *See* Pet. App. 17a-18a. More specifically, the Eleventh Circuit held that the Fulton County-specific studies "disproved" the findings of the studies from other jurisdictions, such that Fulton County was constitutionally prohibited from using the voluminous evidence from other jurisdictions as the basis of adopting the Ordinance. *See* Pet. App. 16a-18a. Accordingly, the Eleventh Circuit reversed, in significant part, the District Court's grant of summary judgment to Fulton County.

The Eleventh Circuit's holding—that Fulton County cannot adopt a regulation such as that contained in the Fulton County

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or any portion of his or her pubic hair, cleft of the buttocks, anus, vulva or genitals, (3) of displaying of pubic hair, anus, vulva, or genitals, (4) of acts which simulate sexual intercourse (homosexual or heterosexual), masturbation, sodomy, bestiality, oral copulation [or] flagellation." Although this definition is not set forth in the record, it is undisputed that Respondents' establishments engaged in "adult entertainment".

Ordinance due to a lack of evidence that Fulton County was then experiencing significant problems with adult entertainment establishments—fails to follow the precedent established by this Court on the issue of what evidence will suffice to support governmental regulation of adult uses and is in direct conflict with the decisions of several other United States Court of Appeals on this issue. Therefore, Fulton County now petitions the Court for a Writ of Certiorari, in order that this Court may correct the errors of the Court of Appeals.

A. Background

On December 17, 1997, Fulton County, through its Board of Commissioners, amended Section 18-76 of its adult entertainment ordinance to prohibit the serving, offering or consuming of any alcoholic beverages on the premises of adult entertainment establishments. *See* Pet. App. 46a-50a.

Prior to the adoption of the Fulton County Ordinance, Fulton County, along with the adult entertainment establishments located in Fulton County, jointly conducted studies regarding negative secondary effects related to the then-existing adult entertainment establishments in Fulton County (hereinafter the "County studies"); four of those establishments are owned by Respondents. The study of police activity determined that, for the years reviewed, the total number of police calls to the adult establishments were less than the total number of police calls to other nightclubs that did not offer adult entertainment. Also, an appraisal report found that property values were not declining in the vicinity of the adult establishments. *See* Pet. App. 4a-5a.

The Fulton County Board of Commissioners did not limit its examination of adult entertainment establishments to the County studies. Additionally, the Board of Commissioners considered multiple other studies from other jurisdictions. The additional studies—derived from the cities of Austin, Texas, Los Angeles, California, Indianapolis, Indiana, and

Minneapolis, Minnesota,—found negative secondary effects caused by adult entertainment establishments. *See* Pet. App. 5a, n.3.

On November 19, 1997, the Board of Commissioners conducted a public hearing on the proposed Ordinance; at that hearing, the Board received testimony from representatives of the adult entertainment establishments opposing the Ordinance, as well as testimony from citizens in favor of the proposed Ordinance. Following a second public meeting on December 17, 1997, the Board of Commissioners adopted the Fulton County Ordinance, such that Fulton County Code of Laws § 18-76, regarding adult entertainment establishments, thereafter read, in relevant part, as follows:

> Any person, firm, partnership, or corporation licensed hereunder shall comply with the following rules and regulations pertaining to the operation of the adult entertainment establishment:
>
> . . .
>
> (7) No licensee shall permit any alcoholic beverages to be served, offered, or consumed on the premises.

See Pet. App. 48a-49a.

Prior to enacting the Ordinance, the Board of Commissioners considered (1) the County Studies; (2) the studies from Austin, Indianapolis, Minneapolis and Los Angeles; and (3) comments received at the November 19, 1997 public hearing. Indeed, Fulton County stated its purposes in adopting the Fulton County Ordinance in the preamble:

> WHEREAS, in a public hearing held November 19, 1997, the Board of Commissioners heard testimony and received studies from its staff, the public, and from representatives of the adult entertainment industry concerning negative secondary effects connected with

adult entertainment facilities where alcoholic beverages are consumed, and live nude, or partially nude, performances are presented;

WHEREAS, based upon the experience of other urban counties and municipalities, which experiences the Board of Commissioners finds are relevant to the problems faced by Fulton County, Georgia, and which do not vary greatly among generally comparable communities within this country, the Board of Commissioners finds that public nudity, under certain circumstances, particularly circumstances related to the sale and consumption of alcoholic beverages in adult entertainment facilities offering live entertainment, begets criminal behavior and tends to create undesirable community conditions;

WHEREAS, among the undesirable community conditions identified with live nude entertainment and alcohol are depression of property values in the surrounding neighborhood, increased expenditure for the allocation of law enforcement personnel to preserve law and order, increased burden on the judicial system as a consequence of the criminal behavior herein above described, and acceleration of community blight by the concentration of such establishments in particular areas;

WHEREAS, the limitation of nude conduct in establishments licensed to sell alcohol for consumption on the premises is in the public welfare, and it is a matter of governmental interest and concern to prevent the occurrence of criminal behavior and undesirable community conditions normally associated with establishments which serve alcohol and also allow or encourage nudity; . . .

See Pet. App. 46a-48a.

B. Proceedings Below

The various Respondents, owners of four adult entertainment establishments located in unincorporated Fulton County, Georgia, filed three lawsuits in the United States District Court for the Northern District of Georgia. Those lawsuits named Fulton County and its Commissioners as defendants and challenged the December 17, 1997 Fulton County Ordinance that prohibits the sale or consumption of alcohol at adult entertainment establishments. Following consolidation of those actions, the Hon. G. Ernest Tidwell granted Fulton County's motion for summary judgment on all claims on February 4, 2000. *See* Pet. App. 24a-43a. More specifically, the District Court held that the Fulton County Ordinance was a content-neutral regulation and that the Ordinance satisfied the four-part test for content-neutral regulations announced in *United States v. O'Brien*, 391 U.S. 367 (1968), including the requirement that the regulation further a substantial governmental interest. *See* Pet. App. 32a-33a. Additionally, the District Court rejected Respondents' due process, prior restraint, and impairment of contract claims. *See* Pet. App. 34a-39a.

On February 20, 2001, a panel of the Eleventh Circuit reversed in part and affirmed in part the District Court's decision. *See* Pet. App. 2a. The Eleventh Circuit agreed that the District Court correctly rejected Respondents' due process, prior restraint, and contract impairment claims. *See* Pet. App. 19a-23a. Additionally, the Eleventh Circuit affirmed the District Court's holding that the Fulton County Ordinance was a content-neutral regulation. *See* Pet. App. 13a. However, in reversing the District Court, the Eleventh Circuit held that the Fulton County Ordinance did not further a substantial government interest, and was therefore violative of the First Amendment to the U.S. Constitution under the *O'Brien* test. *See* Pet. App. 15a-19a. The Eleventh Circuit based this holding on its conclusion that, in adopting the

Fulton County Ordinance, Fulton County could not reasonably rely, as a matter of law, on evidence contained in studies from other jurisdictions, because studies specific to Fulton County did not identify currently-occurring negative secondary effects associated with adult entertainment establishments in Fulton County. On April 23, 2001, the Eleventh Circuit denied Petitioners' Petition for Rehearing *En Banc*. *See* Pet. App. 44a-45a.

REASONS FOR GRANTING THE WRIT

A content-neutral ordinance such as the one at issue in this Petition does not violate the First Amendment[2] if the ordinance satisfies the four-part test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id., 391 U.S. at 376-377. The Eleventh Circuit held that the Fulton County Ordinance failed the second prong of this test. *See* Pet. App. 15a-19a. In so doing, the Eleventh Circuit completely changed the appropriate scope of review required by precedents of this Court and the Eleventh Circuit and created a direct conflict with the decisions of several other Circuit Courts of Appeals.

The second part of the *O'Brien* test states that the identified government interest(s) must be important or substantial and

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[2] The First Amendment applies to the states through the Due Process clause of the Fourteenth Amendment to the U.S. Constitution. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (n. 1) (1996).

must be furthered by the regulation at issue. *O'Brien*, *supra*, 391 U.S. at 376-377. As set forth in this Court's recent decision in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000) and earlier Eleventh Circuit decisions, including *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 997 (11th Cir. 1998), *cert. denied*, 529 U.S. 1052 (2000), avoidance of the negative secondary effects identified by Fulton County, including criminal activity, protection of property values, and avoidance of community blight, are undeniably important or substantial. *See* Pet. App. 47a.

However, the Eleventh Circuit held, as a matter of law, that the Fulton County Ordinance failed to "further" the above-referenced, substantial government interests. In reaching this conclusion, the Eleventh Circuit stated that Fulton County could not reasonably choose to rely on studies from other jurisdictions showing negative secondary effects associated with adult entertainment establishments, when studies specific to existing adult establishments in Fulton County did not indicate negative secondary effects associated with those specific establishments. Pet. App. 18a-19a. In other words, the Eleventh Circuit held that the presence of studies failing to show negative secondary effects from the then-existing adult entertainment clubs constitutionally prevented Fulton County from relying on contrary results from foreign-jurisdiction studies as the basis for the content-neutral regulation of both existing and possible future adult entertainment clubs in Fulton County. This holding not only conflicts with precedent in prior decisions of the Eleventh Circuit and other U.S. Circuit Courts of Appeals, but also decides an important federal question in conflict with the decisions of this Court.

I. THE COURT OF APPEALS' DECISION CREATES A CONFLICT AMONG FEDERAL CIRCUIT COURTS OF APPEALS, IN THAT THE THIRD, FOURTH, SEVENTH AND EIGHTH CIRCUITS HAVE HELD THAT LOCAL GOVERNMENTS NEED NOT EXPERIENCE NEGATIVE SECONDARY EFFECTS PRIOR TO ADOPTING ORDINANCES DESIGNED TO PREVENT SUCH EFFECTS.

The rule announced by the Eleventh Circuit in the present case means that Fulton County, as well as any other jurisdiction presented with a lack of evidence that existing adult entertainment clubs have caused negative secondary effects, cannot enact regulations such as that contained in the Fulton County Ordinance. Rather, such a jurisdiction must wait until existing conditions deteriorate to the point that negative secondary effects do result from existing adult entertainment clubs. Not only is there no support for such a proposition in prior decisions of the U.S. Supreme Court or the Eleventh Circuit Court of Appeals—it is also in direct conflict with the decisions of several other U.S. Circuit Courts of Appeals.

DiMa Corporation v. Town of Hallie, 185 F.3d 823 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000) is directly on point with the present case. In that case, the Seventh Circuit applied negative-secondary-effects analysis to a Hallie ordinance regulating adult bookstores. In support of its claim that such uses result in negative secondary effects, the Hallie ordinance specifically relied only upon another town's ordinance, which in turn had relied upon studies conducted by other cities. *Id.* at 830-831. In contrast, the plaintiff presented contradictory evidence, including specific evidence that its bookstore, "Pure Pleasure", did not cause any of the negative secondary effects Hallie was seeking to address. *Id.*,

at 831. In addressing that evidence and upholding the town ordinance, the Seventh Circuit stated:

> The district court properly rejected [the plaintiff's] evidence because it merely contradicts other evidence that the Hallie Board could reasonably have relied upon. It is therefore irrelevant to the question of whether there is some evidence that does support the Board's conclusions. DiMa's contradictory evidence would be highly probative if our task was to discover the objective truth about the effect of Pure Pleasure's operating in Hallie. But our task under the First Amendment is far different. The Hallie Board has the job of sorting through the available evidence and making a political judgment about what regulations best serve Hallie's interest. We are not here to judge how well the Board did its job; our task is to determine whether the law it enacted violates the Constitution. It does not.

Id. This decision affirmed the Seventh Circuit's long-standing rule on this point. See *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980) ("we agree with the district court that a city need not await deterioration in order to act"); accord, *Cathy's Tap, Inc. v. Village of Mapleton*, 65 F. Supp. 2d 874 (C.D.Il. 1999) (assuming proof that local adult entertainment clubs have not caused negative secondary effects, "there is no requirement that Mapleton await the occurrence of such secondary effects before it enacts legislation designed to prevent them").

At least three other Circuits have reached the same conclusion. In *Wall Distributors, Inc. v. City of Newport News*, 782 F.2d 1165 (4th Cir. 1986), the Fourth Circuit considered a challenge to a city ordinance regulating adult movie arcades. In affirming the ordinance's constitutionality, the Court stated:

> . . . we may not confine the local legislature to only what it knows and can foresee from purely local conditions already experienced. . . . We therefore assess the reasonableness of Newport News' determination not solely on the basis—concededly sparse—of what had already demonstrably occurred within its geographical borders, but of what it might reasonably foresee in light of a sufficiently documented wider national experience properly reflected in matters of public record. . . . To insist that governmental interests justifying such legislation could only be found in specific local experiences and conditions would be unrealistically to require deliberate subjection to those experiences before attempting to avoid them.

Id. at 1169, n.7. The language and reasoning of the Fourth Circuit in *Wall Distributors* has also been specifically adopted by the Eighth Circuit. *See Postscript Enterprises v. City of Bridgeton*, 905 F.2d 223, 226-227 (8th Cir. 1990) (quoting at length from *Wall Distributors* in upholding a city ordinance imposing restrictions on adult movie arcades, even in absence of evidence of negative secondary effects caused by plaintiff business and in absence of any record relied upon by city); *Ambassador Books & Video, Inc. v. City of Little Rock*, 20 F.3d 858, 864 (8th Cir.), *cert. denied*, 513 U.S. 867 (1994) (adult business ordinance constitutional even in absence of evidence of actual secondary effects caused by local adult businesses). *See also ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1418 (8th Cir.), *cert. denied*, 513 U.S. 1017 (1994) ("Under *City of Renton*, Rochester need not prove that [plaintiff's business] would likely have the exact same adverse effects on its surroundings as the adult businesses studied by [the foreign jurisdictions upon whose studies Rochester relied]").

Likewise, the Third Circuit also has held that the First Amendment does not require local evidence of secondary

effects prior to a government's legislative enactment of regulations governing adult entertainment establishments. In *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123 (3rd Cir. 1993), an adult bookstore ("Adult Books") challenged the constitutionality of amendments to Deleware's Adult Entertainment Establishment Act, arguing that Adult Books' particular location and situation constitutionally prevented application of the amendments to its business, "because the amendment's purpose of abating late night noise levels, crime, and sexually offensive materials and activities in residential areas is lacking in Adult Books' particular case." *Id.* at 138. In rejecting this argument, the Third Circuit stated:

> *Renton* indicates that a state legislature considering an ordinance or a statute designed to regulate the incidental undesirable effects of marginally protected expressive activity does not need to survey every adult book store in the state to determine the effect the statute or regulation will have on each. . . . Thus, we agree with the district court's conclusion that the state need not prove that Adult Books' particular ability to disseminate its materials needs restriction in order to prevent the undesirable impact on its neighbors that justified the closing-hours amendment. We think, rather, that *it need only show that adult entertainment establishments as a class cause the unwanted secondary effects the statute regulates.*

Id. (emphasis supplied).

In the present case, Fulton County examined and considered the County studies, the studies from other jurisdictions, and comments made at the public hearing. Based upon the evidence and testimony before it, the Fulton County Board of Commissioners adopted legislation based on nationally-recognized negative secondary effects of adult entertainment establishments, even if local studies did not

find such noticeable effects in Fulton County—a legislative action specifically found valid in the *DiMa Corporation*, *Wall Distributors*, *Postscript Enterprises*, *Ambassador Books* and *Mitchell* decisions. In direct contrast, the Eleventh Circuit prohibits consideration of national studies when potentially flawed local studies exist. Indeed, given the fact that the Board of Commissioners considered evidence of negative secondary effects—in the form of studies from Austin, Indianapolis, Minneapolis, and Los Angeles, as well as testimony offered at its public hearing—the Eleventh Circuit's decision to strike down the Fulton County Ordinance amounts to a substitution of the Court's judgment for the Board of Commissioners' legislative discretion. Because the Eleventh Circuit's decision directly contradicts the conclusions reached on this issue by the Third, Fourth, Seventh and Eighth Circuit Courts of Appeals, this case is proper for the grant of a writ of certiorari.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THE U.S. SUPREME COURT AND EARLIER DECISIONS OF THE ELEVENTH CIRCUIT, IN THAT THE COURTS HAVE REPEATEDLY UPHELD, AS REASONABLE, A GOVERNMENT'S RELIANCE ON THE TYPE OF EVIDENCE RELIED UPON BY FULTON COUNTY IN THE PRESENT CASE.

A. Legislative Decisions By Local Governments Must Be Given Great Deference.

A local government's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) (quoting *Young v. American Mini Theatres*, 427 U.S. 50, 71 (1976)). Thus, for purposes of the second prong of the *O'Brien* test, the question is not whether the existing adult entertainment clubs actually cause negative secondary effects; rather, the question is whether the "evidence . . .

relie[d] on is reasonably believed to be relevant to the problem the [local government] addresses." *City of Renton, supra*, 475 U.S. at 51-52. It is not the Courts' role to rule on the wisdom of a government's legislative act, and such governments "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young*, 427 U.S. at 71. Fulton County examined various studies regarding the negative secondary effects of adult entertainment establishments and exercised its legislative discretion to determine which of these studies applied to the problems it sought to address. This approach conforms to the decisions in *Renton* and *Young*, but is in direct conflict with the Eleventh Circuit's ruling, which effectively replaces Fulton County's discretion with its own. Moreover, other decisions of the Supreme Court and the Eleventh Circuit show that legislative decisions on this issue are to be given great deference, as discussed below.

B. The Fulton County Ordinance Furthered A Substantial Government Interest.

In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the Court held that Indiana's ban on public nudity furthered a substantial government interest, without requiring *any* evidence of how that interest was furthered. 501 U.S. at 569. The Eleventh Circuit's decision in this case points to earlier legislative action by the State of Indiana as proof of furtherance of a governmental interest in *Barnes*. *See* Pet. App. 15a. However, the Eleventh Circuit's reading of *Barnes* confuses two parts of the *O'Brien* analysis: (1) identification of the substantial government interest(s) served by legislation, and (2) whether those interests are furthered by the legislation. While previous Indiana statutes may have identified the governmental interest, the fact remains that there was *no* evidence of how those governmental interests were furthered by the statute at issue in *Barnes*. Indeed, the

Eleventh Circuit simply failed to address its own controlling precedent on this exact point:

> It is clear that under *Barnes*, there is no constitutional requirement that a city make particularized findings regarding the adverse effects of the combination of alcohol and nude entertainment. . . 'It is now established *as a matter of law* by Supreme Court jurisprudence culminating in [*Barnes*] that secondary effects of proscribed conduct may be taken into consideration by a court evaluating the governmental interests justifying impingement upon free speech rights even when, as in *Barnes*, there is *no legislative history* demonstrating that the lawmakers actually considered secondary effects or any other specific factor (such as protecting order and morality) in enacting the challenged law.'

Sammy's of Mobile, 140 F.3d at 997 (n.6) (quoting *Café 207, Inc. v. St. Johns County*, 856 F.Supp. 641, 645 (M.D.Fla. 1994), aff'd. *per curiam*, 66 F.3d 272 (11th Cir. 1995), *cert. denied*, 517 U.S. 1156 (1996))(emphasis supplied). *See also Pap's A.M.*, 529 U.S. at 299 (even *O'Brien* itself, "of course, required no evidentiary showing at all that the threatened harm was real"); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981) ("common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior"); *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1124 (7th Cir. 2001) ("Liquor and sex are an explosive combination"). In addition to showing the substantial deference that the Courts have afforded a local government's legislative determination that a particular enactment furthers a substantial governmental interest, these cases also demonstrate that the actual existence of such negative secondary effects in the government's jurisdiction is immaterial. Thus, the Eleventh Circuit's conclusion that Fulton County possessed no legal authority to adopt the Ordinance in light of the presumed lack

of local negative secondary effects conflicts with *Barnes*, *Paps* and *Sammy's of Mobile*, because those cases demonstrate that reliance on foreign studies is reasonable and satisfies the second prong of the *O'Brien* test.

C. Fulton County's Board Of Commissioners Reviewed Several Forms Of Evidence, Including The County Studies, Studies From Other Local Governments, And Public Comments.

Even in light of the great deference to legislative decisions shown in the above cases, Fulton County did rely upon actual evidence of negative secondary effects. *See* Pet. App. 46a-47a. In addition, Fulton County specifically found studies from other jurisdictions to be relevant to the problems it wished to prevent. *See* Pet. App. 47a. The law is clear that Fulton County may properly, and constitutionally, rely on such studies performed by other local governments. *See, e.g.*, *Pap's A.M.*, 529 U.S. at 296-297; *City of Renton*, 475 U.S. at 51-52; *Sammy's of Mobile*, 140 F.3d at 997.

In its holding that Fulton County's reliance on foreign studies was unreasonable as a matter of law, the Eleventh Circuit relied upon *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985). Unlike the situation in the present case, the *only* evidence in the record in *Krueger* was that the existing adult entertainment clubs in Pensacola did not have significant crime problems. *Id.* at 855. Pensacola had not considered any evidence from other jurisdictions. *Id.* In that case, the Eleventh Circuit announced the standard that the local government must show "that the articulated concern had more than merely speculative factual grounds . . . ." *Id.*

Fulton County's Board of Commissioners considered the testimony of its constituents and the adult entertainment industry, studies from other jurisdictions and the County

Studies. Thus, contrary to the Eleventh Circuit's conclusion, Fulton County obviously has met the standard announced in *Krueger*—its concern regarding negative secondary effects was based on more than mere speculation. *See also Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943, 949 (11th Cir.), *cert. denied*, 459 U.S. 859 (1982) (government must have "some factual basis" for claim that adult uses cause negative secondary effects); *Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1283 (11th Cir. 2001) (second prong of the *O'Brien* test requires at least "some kind of minimal evidentiary showing, even if that showing consists of nothing more than proof that the legislature reasonably relied on findings reported elsewhere suggesting a link between the proscribed expression and negative secondary effects").

D. The Eleventh Circuit Adopted A New Standard That Encourages Local Governments To Avoid Local Studies.

In contravention of the binding authority discussed above, the Eleventh Circuit adopted a new standard in the present case: that, as a matter of law, foreign studies cannot be relied upon where evidence shows that negative secondary effects arguably do not exist with respect to existing adult entertainment clubs in the jurisdiction in question. *See* Pet. App. 18a, 19a. In other words, some evidence is more important than—and prevents reliance upon—other evidence.[3] In sum, the Eleventh Circuit held that the

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[3] Putting the point more bluntly, the Eleventh Circuit stated that the Respondents "challenged and disproved the Board [of Commissioners]'s findings." *See* Pet. App. 16a. In addition to conducting constitutional fact finding (a point seemingly conceded by the Eleventh Circuit; *see* Pet. App. 18a), this statement simply is erroneous. The Respondents' evidence did not disprove Fulton County's finding of negative secondary effects associated with adult uses, as gleaned from the foreign-jurisdiction studies; rather, it simply presented additional, separate data that there was a lack of evidence of certain negative secondary effects associated with the Fulton County adult entertainment clubs during the studied period.

existence of such local data means that the legislative body cannot consider and rely upon studies from foreign jurisdictions. There is simply no authority for this proposition. Rather, as specifically authorized by cases such as *Pap's A.M.* and *City of Renton*, Fulton County considered the evidence presented to it and chose, in its legislative discretion, to rely on the studies from other jurisdictions in an effort to prevent the development of the negative secondary effects that those other jurisdictions had found to be connected to adult uses.

The Eleventh Circuit's decision in the present case obviously alters the standard set forth in the above cases. For the first time, the Eleventh Circuit has announced a rule that the presence of one type of evidence prevents a government's reliance on other evidence. This decision has substantial implications for local governments and their legislative bodies, in that the Eleventh Circuit's decision necessarily entails that a legislative body loses its discretion to legislate in this area if it is presented with evidence of an absence of negative secondary effects caused by existing adult uses in that legislative body's jurisdiction.[4] If the Eleventh Circuit's decision stands, local governments would have an incentive to avoid conducting studies in their own jurisdictions, choosing to rely only on foreign-jurisdiction studies. Such a result is obviously at odds with the fully informed decision-making process to be encouraged in the legislative arena.

More importantly, the obvious result of the Eleventh Circuit's decision is that local governments may only act

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Thus, the County Studies simply were included within the facts from which Fulton County made a legislative decision.

[4] Following the Eleventh Circuit's reasoning to its logical conclusion, a local government that has *no* existing adult entertainment establishments would also be constitutionally prevented from adopting prospective regulations of such establishments, because, obviously, there would be no local negative secondary effects authorizing the government to act.

reactively, not proactively. Such governments would be unable to legislate for their county or city as a whole, as has Fulton County, but rather must await specific evidence of problems with *existing* adult entertainment establishments. Such a rule would substantially redefine this Court's earlier statements regarding the second prong of the *O'Brien* test, as set forth in cases including *Pap's A.M.* and *Barnes*. In contrast to the Eleventh Circuit's decision, those Supreme Court cases hold that Courts must defer to a local government's legislative discretion whenever evidence exists to support that discretionary decision. In this case, the Eleventh Circuit has disallowed consideration of entire categories of legislative evidence and, because of this conflict with controlling precedent of this Court, Fulton County respectfully submits that this is a proper case for grant of a writ of certiorari.

III. THIS COURT GRANTED CERTIORARI IN A SIMILAR CASE, IN WHICH THE NINTH CIRCUIT HELD A LOS ANGELES ADULT-USE ORDINANCE UNCONSTITUTIONAL BE-CAUSE OF PERCEIVED SHORTCOMINGS IN THE EVIDENCE OF NEGATIVE SECOND-ARY EFFECTS RELIED UPON BY THE CITY OF LOS ANGELES.

This Court recently granted certiorari in *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000), *cert. granted*, __ U.S. __, 121 S.Ct. 1223 (March 5, 2001) (S.Ct. Docket No. 00-799). In that case, the Ninth Circuit held unconstitutional a Los Angeles ordinance amendment that prohibited the combination of adult-oriented uses in the same establishment.[5] 222 F.3d at 720-721. As justification

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[5] The fact that *Alameda Books* involves a zoning/location regulation, as opposed to the alcohol restriction at issue in the present case, does not alter its applicability to the present case. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984); *Barnes*, 501 U.S. at

for that ordinance, the City pointed to a 1977 study of the effects of concentration of adult businesses in a given geographic area; that study had been used in conjunction with the original adoption of the ordinance in question. *Id.* The Ninth Circuit held the ordinance unconstitutional because the 1977 study did not specifically examine the effects of combinations of adult uses within one business location; accordingly, the City had no evidence supporting a conclusion that negative secondary effects were produced by such combined uses. *Id.* at 725. In other words, according to the Ninth Circuit, the City had no evidence from which to reasonably conclude that its ordinance served the identified governmental interests. *Id.* In reaching its conclusion, the Ninth Circuit was required to distinguish or decline to follow conflicting rulings from the Third, Fourth and Eighth Circuit Courts of Appeals. *Id.* at 727-728; *see ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir.), *cert. denied*, 513 U.S. 1017 (1994); *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123 (3rd Cir. 1993); *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980). In agreeing to review the Ninth Circuit's decision, this Court has specifically posed a certiorari question related to the sufficiency of the evidence of negative secondary effects relied upon by the City of Los Angeles. Because the same issue is involved in the present case, Fulton County respectfully submits that the instant action is a proper case for the grant of a writ of certiorari to the Eleventh Circuit Court of Appeals.

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566 (*Renton* analysis "embod[ies] much the same standards as those set forth in *United States v. O'Brien*"); *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123, 131, n. 7, (3rd Cir. 1993) ("regardless of whether the analytical framework of *O'Brien* or *Renton* is applied . . ., the result would be the same"). This point has apparently been conceded by Respondents, whose counsel argued to the Eleventh Circuit that *Alameda Books* is directly on point in the present case.

CONCLUSION

For the reasons discussed above, the Court of Appeals incorrectly applied the second prong of the *O'Brien* test to the Fulton County Ordinance, in conflict with prior decisions of the United States Supreme Court, the Eleventh Circuit itself, and the Third, Fourth, Seventh and Eighth Circuit Courts of Appeals. This Eleventh Circuit decision substantially threatens the concept of legislative discretion for local governments in this area—a principle recognized time and again in earlier court decisions—and places the courts of the Eleventh Circuit in the role of weighing legislative evidence against other evidence in an effort to determine what is "reasonable". Because of the Eleventh Circuit's incorrect application of existing Supreme Court precedent and the conflict this decision creates with decisions of other Circuit Courts of Appeals, Fulton County respectfully requests that this Court review the Eleventh Circuit's decision by issuance of a writ of certiorari to that Court.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Feb 20, 2001]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-11152
D.C. Docket No. 98-02441-CV-GET-1

FLANIGAN'S ENTERPRISES, INC. OF GEORGIA,
d.b.a. Mardi Gras,
Plaintiff-Appellant,

versus

FULTON COUNTY, GEORGIA and FULTON COUNTY BOARD OF COMMISSIONERS, in their Individual and Official Capacities,
Defendants-Appellees.

6420 ROSWELL ROAD, INC., d.b.a. Flashers, a Georgia Corporation, HARRY FREESE, Individually and as Licensee for Flashers, FANNIES, INC., and WILLIAM H. PARKS, JR., Individually and as Owner of Fannies,
Plaintiffs-Appellants,

versus

FULTON COUNTY, GEORGIA and FULTON COUNTY BOARD OF COMMISSIONERS, in their Individual and Official Capacities,
Defendants-Appellees.

CEEDA ENTERPRISES, INC.
d.b.a Riley's Restaurant and Lounge,
Plaintiff-Appellant,

versus

FULTON COUNTY, GEORGIA and FULTON COUNTY BOARD OF COMMISSIONERS, in their Individual and Official Capacities,
Defendants-Appellees.

Appeals from the United States District Court
For the Northern District of Georgia

February 20, 2001

Before DUBINA, FAY and COX, Circuit Judges.

PER CURIAM:

Plaintiffs, four adult entertainment businesses ("Plaintiffs") operating in unincorporated Fulton County, Georgia appeal from the grant of summary judgment in favor of defendants Fulton County and its Board of Commissioners. The district court held that a 1997 amendment to Section 18-76 of the Fulton County Code ("Section 18-76" or "1997 amendment") which prohibited the sale and consumption of alcoholic beverages in adult entertainment establishments was constitutional as a matter of law. The district court found that the 1997 amendment operated as a content-neutral restriction that furthered the government's interest in preventing negative secondary effects associated with adult entertainment businesses, and denied Plaintiffs' claims based on due process, prior restraint, and contract impairment. On appeal, Plaintiffs contend that the amendment to Section 18-76 fails to further the government's purported concern because local studies show no evidence of negative secondary effects connected with Plaintiffs' clubs. Plaintiffs also contend that Defendants' conduct in passing the 1997 amendment violated due process, that the amendment impairs their contractual obligations, and that the district court erred in declining to reach the merits of their prior restraint claim. We hold that the 1997 amendment fails to further Defendants' purported concern with negative secondary effects, and accordingly REVERSE IN PART and AFFIRM IN PART the district court's grant of summary judgment.

I. Background Facts

In considering whether to amend Section 18-76, the Fulton County Board of Commissioners ("Board") passed a resolution directing the Fulton County Police Department, the County Attorney, and the Department of Planning and Economic Development (collectively "Fulton County staff") to conduct a study on the secondary effects of alcohol consumption in adult entertainment establishments located in Fulton County. *See* Fulton County, Ga., Resolution Relating to Regulation of Alcohol Consumption in Adult Entertainment Establishments (Apr. 16, 1997). The Board also directed Fulton County staff to assemble similar studies from foreign jurisdictions ("foreign studies"). The resolution stated that the Board had reason to believe that consumption of alcoholic beverages in adult entertainment establishments contributed to increased crime and decreased real property values. The resolution further stated the Board's intent "to enact, if warranted by said studies, a carefully tailored regulation to minimize the negative secondary effects of the serving and consumption of alcoholic beverages at adult entertainment establishments. . . ."

On June 13, 1997, the Fulton County Police Department completed a study concerning the number of calls for police assistance and the number and types of crimes occurring in the vicinity of twelve drinking establishments: six that featured adult entertainment and six that did not. *See* Study of Calls for Service to Adult Entertainment Establishments Which Serve Alcoholic Beverages (June 13, 1997). The study concluded that, for the time period January 1, 1995 through May 31, 1997, there was no statistical correlation showing an increase in crime at adult entertainment establishments that served alcoholic beverages. Rather, the statistics indicated greater instances of calls for service and reported crime at non-adult entertainment establishments that served alcoholic beverages.

In or about June 1997, the six Fulton County adult entertainment establishments ("the Clubs"), four of which are owned by Plaintiffs, commissioned Land Development Analysts, Inc. ("LDA, Inc.") to conduct a study of the Clubs' economic impact on their surrounding environs. Specifically, LDA, Inc. sought to identify negative impacts, if any, on the business volumes, rental rates and property values of surrounding properties. The study revealed high occupancies and rental rates in existing buildings, expensive improvements, business expansions, turn-away business volume and proposed development in the Clubs' vicinities. *See* Economic Impact Study, Six Locations in Three Neighborhoods, Fulton County, Georgia (June 1997). LDA, Inc. could not identify any detrimental impacts as caused by the Clubs.

In response, the Board of Commissioners retained its own appraiser, Dabney & Associates ("Dabney"), to inspect the subject properties and to review the economic impact study prepared by LDA, Inc. The Dabney report claimed several weaknesses with the aforementioned study, but determined that the report's weaknesses did not invalidate it's conclusions.[1] The Dabney report found that LDA, Inc.

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[1] The Dabney report posited that: (1) LDA, Inc.'s use of broad neighborhoods may have eclipsed adverse impacts in the Clubs' immediate areas; (2) the failure to use control neighborhoods precluded evidence that increasing market values might have reached even higher levels without the presence of adult entertainment establishments; and (3) the failure to define key underlying terms, specifically "blight," resulted in undue focus on market conditions that may not directly relate to maintenance of surrounding properties, *see also, infra*, n.2. The Dabney report also criticized LDA, Inc. for failing to detail the results of services it claimed to have performed, such as to review demographic and economic trends, to identify the highest and best use of properties, and to review existing and proposed zoning changes. Because this data did not relate to blight, or a lack of maintenance in and around the Clubs, the Dabney report stated that such omission did not invalidate the conclusions of LDA, Inc.

gathered appropriate data and arrived at reasonable conclusions. Based on the market data provided by LDA, Inc., Dabney found that the Clubs had caused no diminution of property values or rents. *See* An Administrative Review of An Economic Impact Study of Six Locations In Three Neighborhoods, Fulton County, Georgia dated August 7, 1997. Dabney personally observed that none of the subject properties or those around them showed a lack of maintenance.[2] The Clubs bore restrained identification signs, and Dabney found it difficult even to identify two of the Clubs as adult entertainment establishments. Thus, the Dabney report drew similar to identical conclusions to that of LDA, Inc., i.e., that the Clubs had caused no quantifiable "blight" upon their environs.

The Board held two public meetings, on November 19, 1997, and on December 17, 1997, to consider the amendment. At the first public meeting, the Board considered the following: (1) foreign studies collected by Fulton County staff; [3] (2) the LDA, Inc. study; (3) the Fulton County Police study; (4) and the Dabney report. The Board also received public comments and permitted counsel for Plaintiffs fifteen minutes each to present their position regarding the proposed amendment and the relevant studies.

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[2] Noting that THE DICTIONARY OF REAL ESTATE APPRAISAL defines "blight" as a failure to maintain the quality of real estate, Dabney focused on maintenance as a key element contributing to blight. The Dabney report criticized LDA, Inc. for neglecting to directly consider maintenance, but concluded that LDA, Inc. presented information about the Clubs' surrounding areas that might serve as proxies for "maintenance" both in an economic sense and general physical sense.

[3] The foreign jurisdictions studies included: (1) City of Austin, Texas Report; (2) Analysis of Adult Entertainment Businesses in Indianapolis, Indiana; (3) Analysis of the Relationship Between Adult Entertainment Establishments, Crime, and Housing Values in Minneapolis; and (4) Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles.

On December 17, 1997, at the second public hearing, the Board met and approved the amendment to Section 18-76. The 1997 amendment prohibits the serving, offering or consuming of any alcoholic beverages on the premises of an adult entertainment licensee.[4] The preamble to the ordinance provides the Board's justification for the amendment:

> . . . WHEREAS, in a public hearing held November 19, 1997, the Board of Commissioners heard testimony and received studies from its staff, the public, and from representatives of the adult entertainment industry concerning negative secondary effects connected with adult entertainment facilities where alcoholic beverages are consumed, and live nude, or partially nude, performances are presented;
>
> WHEREAS, based upon the experience of other urban counties and municipalities, which experiences the Board of Commissioners finds are relevant to the problems faced by Fulton County, Georgia, and which do not vary greatly among generally comparable communities within this country, the Board of Commissioners finds that public nudity, under certain circumstances, particularly circumstances related to the

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[4] Section 18-76 "Rules for Operation" now states that:

> Any person, firm partnership, or corporation licensed hereunder shall comply with the following rules and regulations pertaining to the operation of the adult entertainment establishment:
>
> . . .
>
> (7) No licensee shall permit any alcoholic beverages to be served, offered, or consumed on the premises.
>
> Violations of these rules and regulations may result in revocation of the license.

Fulton County, Ga., Code § 18-76 (1997) (effective Jan. 1, 1998, provided that adult entertainment facilities holding adult entertainment licenses on Dec. 17, 1997, shall not be subject until Dec. 31, 1998).

sale and consumption of alcoholic beverages in adult entertainment facilities offering live entertainment, begets criminal behavior and tends to create undesirable community conditions;

WHEREAS, among the undesirable community conditions identified with live nude entertainment and alcohol are depression of property values in the surrounding neighborhood, increased expenditure for the allocation of law enforcement personnel to preserve law and order, increased burden on the judicial system as a consequence of the criminal behavior herein above described, and acceleration of community blight by the concentration of such establishments in particular areas;

WHEREAS, the limitation of nude conduct in establishments licensed to sell alcohol for consumption on the premises is in the public welfare, and it is a matter of government interest and concern to prevent the occurrence of criminal behavior and undesirable community conditions normally associated with establishments which serve alcohol and also allow or encourage nudity;

. . . .

Ordinance Amending Fulton County, Ga., Code § 18-76 (Dec. 17, 1997).

II. Procedural History

On August 25, 1998, plaintiff Flanigan's Enterprises, Inc. of Georgia, d/b/a Mardi Gras ("Mardi Gras") filed a civil action in the District Court for the Northern District of Georgia seeking declaratory and injunctive relief and monetary damages. The civil action names Fulton County, a political subdivision of the State of Georgia, and the Fulton County Board of Commissioners, individually and in their official capacities, as defendants (collectively "Defendants"). On October 5, 1998, plaintiff CEEDA Enterprises, d/b/a Riley's Restaurant and Lounge ("Riley's") and plaintiff 6420

Roswell Road, Inc. d/b/a Flashers, Harry Freese, Fannies, Inc., and William H. Parks, Jr. ("Flashers and Fannies") filed suit against the same Defendants. The complaints, filed pursuant to 42 U.S.C. § 1983, seek a declaration that Section 18-76, as amended, operates as an impermissible prior restraint and violates the free speech clause of the First Amendment, the takings clause of the Fifth Amendment, the equal protection clause, and both the substantive and procedural guarantees of the due process clause of the Fourteenth Amendment. The complaints further seek a permanent injunction prohibiting the enforcement of this provision against the Plaintiffs, and damages for condemnation, intentional interference with business relations, and breach of contract.

The district court, Hon. G. Ernest Tidwell, consolidated the three cases by agreement of the parties. On February 4, 2000, the district court entered summary judgment in favor of the Defendants on all claims.[5] Relying on *Sammy's*[6], the district court determined that an ordinance prohibiting nude dancing in establishments licensed to sell liquor constitutes a content-neutral law subject to intermediate scrutiny under *O'Brien*.[7] The district court concluded that Section 18-76 was constitutional as a matter of law because, like the ordinance in *Sammy's*, Section 18-76 was amended to prevent negative secondary effects related to nude dancing, and therefore,

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[5] In all three cases, the Plaintiffs filed separate briefs in response to Defendants' motion for summary judgment. However, the district court addressed each argument as it related to the Plaintiffs as a group because each plaintiff incorporated the briefs and arguments of the other plaintiffs. We employ the same approach because Plaintiffs have incorporated each others' Briefs on appeal.

[6] *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir.1998), *cert. denied*, 529 U.S. 1052, 120 S. Ct. 1553, 146 L. Ed. 2d 459 (2000).

[7] *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).

furthered a substantial government interest unrelated to free expression. The court reasoned that the experience of other urban areas provided the requisite factual basis for the Board's stated justification that nude dancing begets criminal behavior and tends to create undesirable community conditions. Moreover, the district court rejected Plaintiffs' arguments that the Board, in the face of contradictory local studies, unreasonably relied on outdated and foreign studies that focused on the location of adult entertainment businesses rather than the relationship between alcohol and live nude entertainment.

With respect to the Plaintiffs' due process challenge, the district court found that the Defendants' actions in amending Section 18-76 constituted legislative action because the amendment applies generally to all adult entertainment establishments existing now or created in the future. However, even if the 1997 amendment could be characterized as adjudicative in nature, the Clubs did not have a vested right in the renewal of their adult entertainment and liquor licenses because section 18-42 of Article II of the Fulton County Code requires annual registration in accordance with Article II, and the Clubs did not have a vested right in the law never changing.[8] Moreover, the district court found that Plaintiffs were given sufficient due process, i.e., notice of the proposed legislation, time to state their concerns and to submit their own studies at the first public hearing.

The district court did not address the merits of the Plaintiffs' claim that Section 18-76 operates as an invalid prior restraint. The district court found that such a claim was not adequately set forth in the pleadings, and therefore, was untimely raised for the first time in response to the

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[8] As the district court found that the Clubs did not have a vested right in the renewal of their licenses, Plaintiffs' claim for just compensation pursuant to the Fifth and Fourteenth Amendments also failed as a matter of law. Plaintiffs do not contest this finding on appeal.

Defendants' motion for summary judgment. Finally, the district court determined that even if the amendment to Section 18-76 impaired the Clubs' contractual leases, the amendment constituted a necessary exercise of the county's police power in order to prevent the negative secondary effects related to the sale and consumption of alcohol in adult entertainment establishments.

On February 22, 1997, Plaintiffs filed a motion for reconsideration, and on March 3, 1997, the Plaintiffs timely filed a Notice of Appeal. On March 27, 1997, the district court entered an order denying the Plaintiffs' motion to reconsider the order granting summary judgment to the Defendants on all counts. Plaintiffs thereafter proceeded with the present appeal.

III. Discussion

We review a district court's grant of summary judgment de novo, applying the same standards as the district court. *See Harris v. H&W Contracting Co.*, 102 F.3d 516, 518 (11th Cir.1996). We will affirm the district court if the record demonstrates there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Fernandez v. Bankers Nat'l Life Ins. Co.*, 906 F.2d 559, 564 (11th Cir.1990).

A. Freedom of Expression

The Supreme Court has recently reaffirmed that nude dancing of the type at issue here is expressive conduct that falls within the outer ambit of the First Amendment's protection. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382, 1391, 146 L. Ed. 2d 265 (2000) (*citing Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) (plurality opinion)); *see also Schad v. Mount Ephraim*, 452 U.S. 61, 66, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981). Thus, municipal ordinances like the one at issue that regulate nude dancing are subject to constitutional scrutiny.

1. Establishing the Proper Standard of Review

To determine what level of scrutiny applies, we must decide "whether the State's regulation is related to the suppression of expression." *Pap's*, 120 S. Ct. at 1391 (*quoting Texas v. Johnson*, 491 U.S. 397, 403, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)). If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy intermediate scrutiny under *O'Brien*. *Pap's*, 120 S. Ct. at 1391 (citing cases). If the government interest is related to the content of the expression, however, then the regulation falls outside the scope of the O'Brien test and must be subjected to strict scrutiny. *Id.* Thus, the principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys or if it is justified without reference to the content of regulated speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754, 105 L. Ed. 2d 661 (1989).

In *Pap's*, the Supreme Court held that a municipal ordinance banning all public nudity, as applied to establishments that offered nude dancing, was content-neutral. *Pap's*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265. The Court reasoned that the city of Erie's asserted interest in combating negative secondary effects associated with adult entertainment establishments was unrelated to the suppression of the erotic message conveyed by nude dancing. *See id.* As in *Pap's*, the preamble to Section 18-76 expressly states that the 1997 amendment was intended to target the negative secondary effects associated with adult entertainment establishments. Therefore, the Defendants' purpose in prohibiting nude dancing in establishments licensed to sell liquor is not related to the suppression of any erotic message conveyed by nude dancing.

Plaintiffs Fannies and Flashers argue that the amendment to Section 18-76 is distinguishable from the ordinance at issue in *Pap's* because Fulton County is not attempting to ban all public nudity. See *Pap's*, 120 S. Ct. at 1391 (reasoning that the ordinance "does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity"). Fannies and Flashers contend that Section 18-76 is content-based because it only bans nude dancing in establishments licensed to sell alcoholic beverages. Similarly, they claim that Section 18-76 treats live nude dancing differently from non-live nude dancing and, therefore, is content-based because it favors one message over another. If the combustible nature of nudity and alcohol were truly the problem Defendants sought to correct, Fannies and Flashers assert that the Board would have enacted a general ban on nudity. *See Pap's*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265; *Barnes*, 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504.

First, this circuit has specifically held that a city ordinance prohibiting nude dancing in establishments licensed to sell liquor is content-neutral and therefore, subject to review under the O'Brien test. *See Sammy's of Mobile, Ltd., v. City of Mobile*, 140 F.3d 993, 996 (11th Cir.1998), cert. denied, 529 U.S. 1052, 120 S. Ct. 1553, 146 L. Ed. 2d 459 (2000).[9] We have subsequently reaffirmed this holding, guided by *Pap's*, reasoning that regulations targeting undesirable secondary effects of adult entertainment establishments that

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[9] The Clubs argue that the ordinance at bar is distinguishable from that in Sammy's because Fulton County did not rely on the Twenty-first Amendment in amending the ordinance. However, the district court correctly found that "[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996). This power is located in the inherent police power of every state to regulate to promote public decency. *Id.*

serve alcoholic beverages are unrelated to the suppression of the erotic message conveyed by nude dancing. *Artistic Entertainment, Inc. v. City of Warner Robins*, 223 F.3d 1306, 1309 (11th Cir.2000) (explaining that ordinance's express purpose was to reduce criminal activity and "other undesirable community conditions"); *Wise Enterprises, Inc., v. Unified Government of Athens-Clarke County*, 217 F.3d 1360, 1363-64 (11th Cir.2000) (reproducing ordinance providing that combination of public nudity in combination with the sale and consumption of alcoholic beverages "begets criminal behavior and tends to create undesirable community conditions").

Second, the Supreme Court has recognized that a regulation is not necessarily content-based simply because on its face it distinguishes among types of speech based on their content. *See Renton v. Playtime Theatres*, 475 U.S. 41, 46-48, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986). In *Renton*, the plaintiff argued that the ordinance was content-based because it treated theaters that specialized in adult films differently from other kinds of theaters. However, the Court applied intermediate scrutiny reasoning that the ordinance was aimed not at the content of the films shown at the adult motion picture theaters, but rather at the secondary effects of such theaters on the surrounding community. Here, as in *Renton*, the Board's predominate concern, as manifested in the preamble of Section 18-76, was the secondary effects of nude dancing combined with the consumption of alcoholic beverages, not at the message conveyed by nude dancing. Accordingly, we find that amended Section 18-76 is content-neutral and review the Fulton County ordinance pursuant to the test set forth in *O'Brien*.

2. Applying the O'Brien test

Under *O'Brien*, an ordinance is valid if: (1) it serves a substantial interest within the power of the government; (2) the ordinance furthers that interest; (3) the interest served

is unrelated to the suppression of free expression; and (4) there is no less restrictive alternative. *See O'Brien*, 391 U.S. at 377, 88 S. Ct. at 1679. Defendants assert that Section 18-76 was amended to prevent the occurrence of criminal behavior and undesirable community conditions, specifically identified in the preamble as depression of property values, increased crime, and acceleration of community blight. Such interests are substantial government interests that satisfy the first part of the O'Brien test. *See, e.g., Pap's* (applying O'Brien test to city of Erie's prohibition on public nudity and finding that stated interest in combating secondary effects related to nude dancing is clearly within city's police powers to protect public health and welfare).

Section 18-76 also satisfies the third and fourth prongs of the O'Brien test. *See O'Brien*, 391 U.S. at 377, 88 S. Ct. at 1679. Both our court and the Supreme Court have expressly held that an ordinance focusing on the secondary effects associated with the combination of nude dancing and alcohol consumption is unrelated to the suppression of free expression. *See Pap's*, 120 S. Ct. at 1393 (stating that the government's interest in combating harmful secondary effects is not related to the suppression of expression); *accord Wise Enterprises, Inc.*, 217 F.3d 1360, 1364.[10] Moreover, such a restriction on First Amendment rights is no greater than necessary to further the government's interest, as required under the fourth prong of the O'Brien test. *See Pap's*, 120 S. Ct. at 1397 (concluding that, in order to comply with ordinance, requirement that dancers wear pasties and G-strings leaves ample capacity to convey the dancer's erotic message); *Wise Enterprises, Inc.*, 217 F.3d at 1365 (reasoning that ordinance does not prohibit all nude dancing, but only in those locations where the unwanted secondary effects arise).

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[10] Although the Plaintiffs contend that Section 18-76 fails to meet this factor, they present no evidence that Fulton County passed the ordinance to hinder the communicative aspects of such conduct.

The second prong of the O'Brien test, however, states that the regulation must further an important government interest. *See O'Brien*, 391 U.S. at 376, 88 S. Ct. 1673. The avoidance of criminal activity, protection of property values, and avoidance of community blight are undeniably important. *See Pap's*, 120 S. Ct. at 1395 (stating that asserted interest in combating secondary effects associated with nude dancing are undeniable important). However, it is less clear whether Section 18-76 furthers the Defendants' stated interest in preventing the occurrence of negative secondary effects associated with the types of businesses operated by Plaintiffs.

In order to meet their burden under this element, the Defendants must have "some factual basis for the claim that [adult] entertainment in establishments serving alcoholic beverages results in increased criminal activity" and other undesirable community conditions. *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943 (11th Cir.1982) (upholding county ordinance prohibiting nude and semi-nude entertainment in establishments licensed to sell liquor where city commissioners had evidence that substantial criminal activity took place in topless bars). In terms of demonstrating that such secondary effects pose a threat, the city need not "conduct new studies or produce evidence independent of that already generated by other cities . . . so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Pap's*, 120 S. Ct. at 1395 (*quoting Renton*, 475 U.S. 41, 51-52, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986)). In *Barnes*, for example, the Court determined that Indiana's public indecency statute reflected moral disapproval of people appearing nude in public, and found evidence in a long line of public indecency laws, dating from 1831, that the statute furthered the government's interest in protecting order and morality. *See Barnes*, 501 U.S. 560, 567-68, 111 S. Ct. 2456, 2460-62, 115 L. Ed. 2d 504. In *Pap's*, the Supreme Court held that Erie city council members could reasonably rely on the experience

of other cities, in addition to their own first-hand knowledge, as evidence that the same kind of nude dancing was likely to produce the same secondary effects. *See Pap's*, 120 S. Ct. at 1395. Thus, we find no basis for Defendants' contention that, pursuant to *Pap's* and *Barnes*, we may presume the evidence needed to meet the second prong of the O'Brien test.[11]

Our own cases demonstrate that we require some reasonable justification for legislation which suppresses, albeit incidentally, protected expression.[12] *See Sammy's*, 140 F.3d at 997 (relying upon the experience of other cities, foreign studies, case law reciting findings, as well as the officials' own wisdom and common sense); *Wise Enterprises, Inc.*, 217 F.3d at 1364 (experience of other cities, foreign studies, and a local police report documenting police visits to adult entertainment establishments). In this case, the Board amended Section 18-76 of the adult entertainment ordinance because it was concerned that adult entertainment facilities caused (a) depression of property values; (b) increase in crime and expenditures related thereto; and (c) neighborhood blight. *See* Preamble to Ordinance Amending Section 18-76. Unlike in *Pap's* and *Sammy's*, where the plaintiffs never challenged the cities' findings, the Fulton County Clubs challenged and disproved the Board's findings. The evidence in the record relating to conditions in Fulton County shows unequivocally that property values in neighborhoods adjoining the Clubs

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[11] For example, Defendants contend that the Supreme Court in *Barnes* upheld Indiana's ban on public nudity without requiring any evidence of how the government's interest was furthered. In fact, the Court found it difficult to discern what governmental interest the legislation served because Indiana does not record legislative history. However, the Court found that the history of Indiana's public indecency statute, dating from 1831, evinced that the statute furthered the government's interest in protecting societal order and morality.

[12] Although we might disagree that nude dancing contains any expression protected by the First Amendment, the test has been given us. We will not merely go through the motions of applying it.

have increased during the time the Clubs have been in existence, and that surrounding buildings show no signs of blight, or lack of physical maintenance. Moreover, the Fulton County police study found greater reported crime connected with establishments that served alcohol but did not feature adult entertainment. In other words, local studies commissioned both by the Clubs and the Board found no evidence of the secondary effects with which the Board was purportedly concerned. The question thus becomes, was it reasonable for Defendants to ignore relevant local studies and rely instead upon remote foreign studies in determining whether adverse secondary effects were attributable to the Fulton County Clubs?

We do not think that Defendants had any reasonable justification for amending Section 18-76 when the county's own studies negated the very interests it purportedly sought to prevent. *See Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir.1985). In *Krueger*, we stated that where the right to free speech is at issue, the government bears the burden of showing that the articulated concern has more than merely speculative factual grounds, and that it was actually a motivating factor. *See id.* at 855. Thus, in that case, we held unconstitutional a city ordinance which banned nudity in establishments that served alcoholic beverages because the city failed to produce any evidence of a crime problem, the city's purported justification in passing the ordinance. *Id.; cf. Grand Faloon Tavern*, 670 F.2d 943, 950 (report of police calls and testimony of police officers concerning crime associated with nude entertainment provided necessary link between stipulated purpose of the ordinance and the problems justifying it). We recognize that a governmental entity is not required to perform empirical studies. *See Pap's*, 120 S. Ct. at 1395. However, having done so, the Board cannot ignore the results. Local studies, including those commissioned by the county itself, revealed that the Clubs had less, up to half, the incidence of crime than establishments that did

not offer nude dancing, property values had increased in the Clubs' surrounding neighborhoods, and the physical maintenance of surrounding buildings showed no quantifiable blight. Accordingly, we find that it was unreasonable for Defendants to rely on remote, foreign studies concerning secondary effects when the county's own current, empirical data conclusively demonstrated that such studies were not relevant to local conditions.[13]

The case might be different were the Clubs a recent addition to Fulton County neighborhoods. It is undisputed, however, that Plaintiffs have continually operated these adult entertainment establishments for nearly a decade.[14] We realize that our decision today appears to result in constitutional fact finding, in which the constitutionality of an ordinance will depend on local conditions. However, we have no choice; we are bound by the decisions of the Supreme Court and the law of our circuit. To be sure, Defendants may respond by enacting a ban on all public nudity; the Supreme Court has upheld that. *See Pap's*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265; *see also Barnes*, 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504. However, Defendants may not ban nude dancing in establishments licensed to sell liquor without any factual basis to support the claim that these establishments are connected with negative secondary effects.

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[13] Given our decision, we need not address the Plaintiffs' argument that the foreign studies relied upon by Defendants do not examine the connection between drinking and nude dancing, and secondary effects. *Cf. Diva's, Inc. v. City of Bangor*, 21 F. Supp. 2d 60 (D.Me.1998) (holding unconstitutional ordinance enacted in reliance on foreign studies which focused only on efficacy of land use and zoning schemes in reducing crime).

[14] In their Reply Brief to the Motion For Summary Judgment, Defendants concede that Mardi Gras has continually operated an adult entertainment establishment in Fulton County since 1992, Flashers since 1991, Fannies since 1984, and Riley's since 1983.

We reiterate that, to satisfy the O'Brien test, the county must demonstrate that it reasonably relied upon evidence relevant to the problem that it addresses. *See Pap's*, 120 S. Ct. at 1395. We simply cannot find it reasonable for a government entity to conduct studies on specific areas and then to reject the conclusions thereof in favor of studies from different cities and different time periods. Accordingly, we hold that Section 18-76 is unconstitutional under the O'Brien test because the ordinance fails to further the professed government interests.

B. Due Process

Plaintiffs Flashers and Fannies contend that Section 18-76, as amended, deprives the Clubs of a vested property right in their alcoholic beverage and adult entertainment licenses in violation of due process of law. U.S. Const. Amend. XIV, § 1. They assert that the Clubs have a vested right in these licenses based on the fact that Defendants have renewed their licenses in the past, as well as their expectation of renewal due to the wording of the licensing scheme. Defendants argue that the 1997 amendment effects all existing and future adult entertainment establishments in Fulton County, and as such, constitutes legislative action undertaken by the Board in the normal manner prescribed by law.[15] Alternatively,

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[15] Plaintiffs argue that the ordinance constitutes adjudicative action because they occupy the only sites for adult entertainment; that Fulton County exempted them, as a prior non-conforming use, from a 1992 zoning ordinance prohibiting adult entertainment in establishments licensed to sell alcoholic beverages. The district court found that Section 18-76 applies to all adult entertainment establishments, whether existing or future, and relied on the averment of the Deputy Director of Environment and Community Development to the effect that numerous sites are available in Fulton County for other adult entertainment establishments. The district court also found that Plaintiffs do not have a vested property interest in the renewal of their license because, the Clubs were not exempt from the county's legitimate exercise of its police powers in furtherance of a substantial government interest. *Accord,*

Defendants argue that Plaintiffs had nothing more than a unilateral expectation in the renewal of their licenses, and as such were not exempt from a change in the law pursuant to a legitimate exercise of the city's police power to protect public welfare and safety. Finally, Defendants assert that the Plaintiffs received due process.[16]

Due process of law requires notice and an opportunity for some kind of hearing prior to the deprivation of a significant property interest. *Halverson v. Skagit County*, 42 F.3d 1257, 1260 (9th Cir.1994). Assuming, *arguendo*, that Section 18-76 operates as an adjudication targeted at the Clubs, and that the Clubs have a vested property right in their adult entertainment and liquor licenses, we agree with the district court that Plaintiffs were granted due process.[17] Plaintiffs' claim of a lack of procedural due process fails as a matter of law.

C. Prior Restraint

Next, Flashers and Fannies argue that the district court erred in failing to consider their claim that Section 18-76 is

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Goldrush II v. City of Marietta, 267 Ga. 683, 696, 482 S.E.2d 347 (1997) (rejecting plaintiff's state and federal constitutional claims).

[16] Although in their Brief Flashers and Fannies allege that the Defendants deprived the Clubs of their right to substantive and procedural due process, they fail to elaborate or provide any citation of authority in support of the former allegation. Therefore, we are left to conclude that Flashers and Fannies have waived this argument, and address only the claim for procedural due process. *See* Fed. R.App. P. 28(a)(9); *see also Continental Tech. Servs., Inc., v. Rockwell Int'l Corp.*, 927 F.2d 1198, 1199 (11th Cir.1991).

[17] Plaintiffs had notice of the Defendants' contemplated action at least as early as April 16, 1997, eight months prior to the amendment of Section 18-76. The Clubs were represented on a specially formed Adult Entertainment Committee, and had opportunity to discuss issues relating to the regulation at two public meetings of this committee. Finally, the Board conducted two public hearings, and permitted fifteen minutes to each Plaintiff's counsel, present at the first hearing, in order to present the Clubs' concerns and the Clubs' studies.

part of a licensing scheme that operates as an invalid prior restraint. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990). In declining to address the merits, the district court held that the Plaintiffs' challenge to the licensing scheme was a new claim raised for the first time in response to the Defendants' motion for summary judgment. That response, filed more than fifteen months after commencement of this suit, was unaccompanied by either a motion to amend the pleadings or any reason justifying an amendment. Thus, we must decide whether the Plaintiffs' pleadings were sufficient to give Defendants and the court notice that the entire licensing scheme, and not just Section 18-76 were subject to challenge as a prior restraint. *See Lyes v. City of Riviera Beach*, 126 F.3d 1380, 1387 (11th Cir.1997) (deciding whether complaint invoking Fourteenth Amendment gave notice of equal protection claim where district court only analyzed due process claim).

Plaintiffs' complaints, at first blush, expressly challenge the "Liquor Ordinance" or "Ordinance" as a prior restraint. *See* Mardi Gras complaint in Civ. No. 1-98-CV2441, ¶¶ 34, 44; Plaintiffs Flashers' and Fannies' complaint in Civ. No. 1-98-CV-2904, ¶¶ 33, 42; Plaintiff Riley's complaint in Civ. No. 1-98-CV-2910, ¶ 8. However, a closer reading reveals that Plaintiffs specifically limited their constitutional challenge to the 1997 amendment which restricted the sale and consumption of alcohol at adult entertainment establishments, and the absence of negative secondary effects connected with the Clubs.[18] By contrast, the licensing scheme which Plaintiffs now attack is contained in separate sections of the

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[18] For example, Mardi Gras' complaint prays for a preliminary injunction on the basis that "the ordinance prohibiting the sale or consumption of alcohol on the premises of adult entertainment facilities (the 'Liquor Ordinance') is facially invalid in that it . . . constitutes a prior restraint. . . ." *See* Mardi Gras Complaint, ¶ 34. In fact, each of the nine legal causes of action asserted by Mardi Gras relies specifically on the 1997 amendment to Section 18-76.

Fulton County Code, sections 18-111 and 18-112 Division 2. Chapter 18 Article III. No part of the licensing regulation was a part of the 1997 amendment to Section 18-76 "Rules for Operation" Division 1. Chapter 18 Article III. We have not even been able to locate sections 18-111 and 18-112 of the Fulton County Code in the record. Accordingly, we find that the Plaintiffs failed to plead facts sufficient to notify Defendants or the court that they challenged the licensing scheme as a whole. We affirm the district court's decision not to address the merits of this claim.[19]

D. Obligation of Contract

Finally, Flashers and Fannies claim that Section 18-76 impairs the Clubs' right to contract in violation of the Contracts Clause. *See* U.S. Const. art. I, § 10, cl. 1. Specifically, Flashers and Fannies argue that their leases provide that the premises shall be used for a topless nudity bar, and require both clubs to maintain a liquor license.[20]

The United States Constitution provides that "no state shall . . . pass any Law impairing the Obligation of Contracts. . . ." U.S. Const. Art. I, § cl. 1. In evaluating a Contracts Clause

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[19] In its Brief, Flashers and Fannies contend that the district court erred in severing the prior restraint analysis from the question of the constitutionality of Section 18-76 because that section is part and parcel of a licensing scheme which operates as a prior restraint. However, the authority they cite is inapposite. *See 10280 Northfield Road, LLC v. Village of Northfield*, 173 F.3d 429 (6th Cir.1999). In that case, the Village of Northfield adopted an ordinance that sought to regulate adult entertainment businesses by enacting a zoning and licensing scheme. *See id.* The district court found that the licensing scheme operated as an unconstitutional prior restraint, and attempted to salvage the ordinance by severing the licensing scheme. *See id.* The Sixth Circuit held that the district court had impermissibly rewritten the ordinance because the ordinance was designed to function through the issuance or rejection of conditional permits. *See id.* These facts are not presented here.

[20] The record does not contain evidence of lease provisions involving the other Plaintiffs.

claim, the court must determine whether the state law operates as a substantial impairment of a contractual relationship and if so, whether the impairment is necessary to meet an important government interest. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978). However, "it is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States. . . . [T]he police power [ ] is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." *Spannaus*, 438 U.S. 234, 244, 98 S. Ct. 2716, 2722, 57 L. Ed. 2d 727.

We have already determined that the amendment to Section 18-76 constitutes a valid exercise of the Defendants' police powers. *See Pap's* (combating secondary effects related to nude dancing is clearly within city's police powers to protect public health and welfare). Thus, even if Section 18-76 impairs Plaintiffs' contractual leases, we agree with the district court that the ordinance remains a valid exercise of the County's police power to protect the health, safety, welfare and morals of its citizens.

IV. Conclusion

The district court granted summary judgment for Defendants on all grounds. We REVERSE the grant of summary judgment on the First Amendment freedom of expression claim and AFFIRM the grant of summary judgment on all other claims. We REMAND the case to the district court for further proceedings consistent with this opinion.

APPENDIX B

[Filed Feb 3, 2000]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
NO. 1:98-cv-2441-GET

FLANIGAN'S ENTERPRISES, INC.
of GEORGIA, d/b/a Mardi Gras,

Plaintiff,

v.

FULTON COUNTY, GEORGIA, THE BOARD OF COMMISSIONERS OF FULTON COUNTY, GEORGIA, MITCH SKANDALAKIS, individually and in his official capacity as Chairman of the Board of Commissioners of Fulton County, Georgia, NANCY BOXILL, GORDON JOYNER, ROBERT FULTON, TOM LOWE, EMMA DARNELL, and MICHAEL HIGHTOWER, individually and in their official capacities as members of the Board of Commissioners of Fulton County, Georgia,

Defendants.

CIVIL ACTION
NO. 1:98-cv-2904-GET

6420 ROSWELL ROAD, INC. d/b/a Flashers, a Georgia Corporation, HARRY FREESE, individually and as Licensee for Flashers, FANNIES, INC., and WILLIAM H. PARKS, JR., individually and as owner of Fannies,

Plaintiffs,

v.

FULTON COUNTY, GEORGIA, THE BOARD of COMMISSIONERS of FULTON COUNTY, GEORGIA, MITCH SKANDALAKIS, individually and in his official capacity as Chairman of the Board of Commissioners of Fulton County, Georgia, NANCY BOXILL, GORDON JOYNER, ROBERT FULTON, TOM LOWE, EMMA DARNELL, and MICHAEL HIGHTOWER, individually and in their official capacities as members of the Board of Commissioners of Fulton County, Georgia,

Defendants.

CIVIL ACTION
NO. 1:98-cv-2910-GET

CEEDA ENTERPRISES, INC., d/b/a RILEY'S RESTAURANT AND LOUNGE,

Plaintiff,

v.

FULTON COUNTY, GEORGIA, THE BOARD of COMMISSIONERS of FULTON COUNTY, GEORGIA, MITCH SKANDALAKIS, individually and in his official capacity as Chairman of the Board of Commissioners of Fulton County, Georgia, NANCY BOXILL, GORDON JOYNER, ROBERT FULTON, TOM LOWE, EMMA DARNELL, and MICHAEL HIGHTOWER, individually and in their official capacities as members of the Board of Commissioners of Fulton County, Georgia,

Defendants.

ORDER

The above-styled action is presently before the court on defendants' motion for summary judgment (Case No. 98-cv-2441-GET) [docket no. 10-1] (Case No. 98-cv-2904-GET) [docket no. 8-1] (Case No. 98-cv-2910) [docket no. 11-1].

The three cases cited above have been consolidated by agreement of the parties. All plaintiffs have filed suit against defendants Fulton County and its Board of Commissioners alleging that amendments to Section 18-76 of Fulton County's adult entertainment ordinance, which prohibit the serving, offering or consuming of any alcoholic beverages on the premises of an adult entertainment establishment, violate the United States Constitution. Plaintiffs seek damages, a declaratory judgment stating these amendments are invalid, and a permanent injunction prohibiting the enforcement of these ordinance provisions against the plaintiffs. At this time, defendants seek summary judgment of all plaintiffs' claims.

I. Standard of Review

Courts should grant summary judgment when "there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must "always bear the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). That burden is "discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325; *see also U.S. v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991).

Once the movant has met this burden, the opposing party must then present evidence establishing that there is a genuine issue of material fact. *Celotex*, 477 U.S. at 325. The nonmoving party must go beyond the pleadings and submit evidence such as affidavits, depositions and admissions that are sufficient to demonstrate that if allowed to proceed to trial, a jury might return a verdict in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). If he does so, there is a genuine issue of fact that requires a trial. In making a determination of whether there is a material issue of fact, the evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor. *Id.* at 255; *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529 (11th Cir. 1987). However, an issue is not genuine if it is unsupported by evidence that is "merely colorable" or is "not significantly probative." *Anderson*, 477 U.S. at 249-50. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the nonmoving party's case. *Id.* at 248. Thus, to create a genuine issue of material fact for trial, the party opposing the summary judgment must come forward with specific evidence of every element essential to his case with respect to which (1) he has the burden of proof, and (2) the summary judgment movant has made a plausible showing of the absence of evidence of the necessary element. *Celotex*, 477 U.S. at 323.

II. Background

In light of the forgoing standard, the court finds the following facts for the purpose of resolving defendants' motions for summary judgment only.

On April 16, 1997, the Fulton County Board of Commissioners ("Board") passed a resolution directing the Police Department, the County Attorney, and the Department of Planning and Economic Development to conduct a study on the secondary effects of alcohol consumption in adult entertainment establishments in Fulton County. In June 1997,

the study of the six Fulton County establishments, four of which are owned by plaintiffs, was completed and distributed to the Board members on November 14, 1997, five days before the first public hearing to discuss the potential secondary effects. The study identified no detrimental impacts caused by these subject facilities.

The packet of information given to the Board on November 14 prior to the first public meeting also included outside studies of negative secondary effects of adult entertainment establishments and establishments which serve alcohol. These studies derived from the following cities: Austin, Texas, Los Angeles, California, Indianapolis, Indiana, and Minneapolis, Minnesota. Plaintiffs contend that these outside studies were not formally entered into the record at the November 17, 1997 meeting and therefore it is unclear as to whether the Board considered them before making their decisions and voting on the proposed ordinance to prohibit alcoholic consumption in establishments with live nude entertainment. However, the deposition testimony of the Board, together with the deposition of Angela Parker, Deputy Director of Environment and Community Development and the affidavit of Robert Regus, the Fulton County Manager during the relevant period, show that studies of other cities were given to each commissioner before the first public hearing and were considered by the Board before voting on the ordinance.

At the November 19 hearing, public comments were taken and counsel for plaintiffs were each allowed fifteen minutes to present their position regarding the proposed ordinance and the relevant studies.

On December 17, 1997 at the second public hearing, the Board met and approved the amendment to section 18-76 "Rules for Operation" prohibiting the serving, offering or consuming of any alcoholic beverages on the premises of an adult entertainment licensee. Section 18-76 now states that

> Any person, firm partnership, or corporation licensed hereunder shall comply with the following rules and regulations pertaining to the operation of the adult entertainment establishment:
>
> . . .
>
> 7. No licensee shall permit any alcoholic beverages to be served, offered, or consumed on the premises.
>
> Violations of these rules and regulations may result in revocation of the license.

On August 25, 1998, plaintiff Flanigan's Enterprises, Inc. of Georgia, d/b/a Mardi Gras ("Flanigan's") filed a civil action against defendants Fulton County and the Fulton County Board of Commissioners, individually and in their official capacities. Flanigan's seeks a declaratory judgment that section 18-76 is unconstitutional, a preliminary and permanent injunction against the law's application, and damages for condemnation, intentional infliction of economic harm and breach of contract. On October 5, 1998, plaintiff CEEDA Enterprises, d/b/a Riley's Restaurant and Lounge ("CEEDA") and plaintiff 6420 Roswell Road, Inc. d/b/a Flashers, Harry Freese, Fannies, Inc., and William H. Parks, Jr. ("collectively Flashers and Fannies") filed suit against the same defendants. CEEDA Flashers and Fannies also request a declaratory judgment that the law is unconstitutional, a permanent injunction, and damages. Plaintiffs Flashers and Fannies further seek damages for condemnation, intentional infliction with business relations, and breach of contract. The cases have been consolidated by agreement of the parties. Together the plaintiffs represent four of the six adult entertainment establishments presently located in unincorporated Fulton County.

III. Discussion

Defendant Fulton County and its respective Board of Commissioners filed the instant motion for summary judgment contending that under the precedent of *Sammy's of Mobile, Ltd v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998), and *Goldrush II, Inc. v. Marietta*, 267 Ga. 683 (1997), the amendments to Fulton County's entertainment ordinance are constitutional. The Board reviewed several secondary effect studies and held two public hearings, concluding that the combination of public nudity and alcohol results in criminal behavior and undesirable community conditions. Defendants claim that the amendments were passed pursuant to the county's legitimate objectives to (1) preserve the quality of urban life, (2) reduce crime, and (3) prevent neighborhood deterioration.

In all three cases, the respective plaintiffs have filed separate briefs in response to defendant's motion for summary judgment, however each has incorporated the briefs and arguments by the other plaintiffs. Accordingly, the court will address each argument as it relates to plaintiffs as a group.

A. *Level of scrutiny and the O'Brien test*

The Supreme Court has recognized that nude dancing may have some expressive content and if so, is therefore protected by the First Amendment. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566, 111 S. Ct. 1495 (1991) (holding that nude dancing is "expressive conduct within the outer perimeters of the First Amendment"). Municipal ordinances like the one at issue that regulate nude dancing are consequently subject to constitutional scrutiny, the level of which depends on whether the law seeks to regulate the content of the particular conduct. *Id.* Pursuant to the First Amendment, content-based regulations are presumptively invalid. *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 381, 112 S. Ct. 2538 (1992)

(citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 112 S. Ct. 501 (1991)). However, in a few limited areas, restrictions upon the content of speech have been allowed where the social value of the particular speech is slight and obviously outweighed by society's interest in "order and morality." *R.A.V.*, 505 U.S. at 385 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 769 (1942)); *see e.g., California v. LaRue*, 409 U.S. 109, 114, 93 S.Ct. 390, 395 (1972) (holding that ordinance prohibiting nude dancing was valid).

As mentioned above, the first step in determining whether an ordinance regulating protected conduct is constitutional is to determine whether the law is content-based or content neutral and apply the appropriate level of scrutiny. *See Burson v. Freman*, 504 U.S. 191, 197-198, 112 S. Ct. 1846, 1850-1851 (1992); *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 133-135, 112 S. Ct 2395, 2403-2404 (1992).

In *Sammy's*, the Eleventh Circuit clearly held that an ordinance similar to the one at issue in this case was content-neutral and therefore should be reviewed under intermediate scrutiny. 140 F.3d at 996. As in this case, the plaintiff clubs in *Sammy's* held liquor licenses and offered nude entertainment and were challenging the constitutionality of a city ordinance which prohibited nude dancing in establishments licensed to sell liquor. Accordingly, the court finds that the Fulton County ordinance is content-neutral and is constitutional under the *O'Brien* intermediate scrutiny test if "(1) the interest served is within the power of the government; (2) the regulation furthers that interest; (3) the interest served is unrelated to free expression; and (4) there is no less restrictive alternative." *Sammy's*, 140 F.3d at 996 (citing *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673 (1968)). The court finds that plaintiff CEEDA's argument regarding the Board's alleged disregard of the local studies is not addressed to the

level of scrutiny issue, but instead speaks to whether the regulation will further the government's substantial interest in regulating crime and morality as will be discussed below.

Under the *O'Brien* test, plaintiffs concede that the government can regulate nude dancing and that the statute is not overbroad. However, plaintiffs assert that the government has failed to show as a matter of law that the regulation furthers a legitimate interest and that the interest served is unrelated to free expression.

After careful review of the record, as well as the relevant law, the court finds that the amendment to section 18-76, prohibiting the sale of alcohol in adult entertainment establishments, is constitutional under the *O'Brien* test. As the Eleventh Circuit held in *Krueger v. City of Pensacola*, 759 F.2d 851, 855 (1985), the government must show more than speculative factual grounds and must further show that it was motivated by such facts. The preamble of the 1997 amendment to section 18-76 states clearly that the Fulton County Board of Commissioners has found that, according to the relevant experience of other similar urban counties and municipalities, public nudity "under certain circumstances in adult entertainment facilities offering live entertainment begets criminal behavior and tends to create undesirable community conditions." Thus, just as the Eleventh Circuit held in *Sammy's*, which addressed an almost identical city ordinance, defendants Fulton County and its Board of Commissioners have established that the amendment to section 18-76 furthers a government interest unrelated to free expression: the prevention of negative secondary effects related to nude dancing. *Sammy's*, 140 F.3d at 997 (finding that the Supreme Court as well as the Eleventh Circuit have approved of many ordinances which regulate nude entertainment). *See also, Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570, 111 S. Ct. 2456, 2462-63 (1991) (upholding Indiana's prohibition on public nudity as applied to nude

dancing); *California v. LaRue*, 409 U.S. 109, 114, 93 S. Ct. 390, 395 (1972) (finding California's rules censoring sexual live entertainment at establishments licensed to disperse liquor to be constitutional).

In their brief, plaintiffs further argue that the absence of any reference to the Twenty-first Amendment distinguishes this ordinance from that considered in *Sammy's*. The Twenty-first Amendment grants states authority to regulate the distribution of alcohol within their borders. U.S. Const., amend. XXI. The court finds the absence of any citation in the preamble of Fulton County's ordinance to the Twenty-first Amendment to be irrelevant as Fulton County has the authority to pass such laws pursuant to its general police power. *See LaRue*, 517 U.S. at 515 ("[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations"); *Krueger*, 759 F.2d at 854 (holding that as Florida has not delegated its regulatory authority under the Twenty-first Amendment to municipalities, the city must justify its ordinance under the government's police power).

Additionally, plaintiffs unsuccessfully suggest that *Sammy's* is not binding precedent under the facts of this case. First, plaintiffs complain about the age of the studies in this case and the fact they concern cities many miles away. However, plaintiffs do not argue that the adult entertainment industry has changed significantly over this time so as to lessen these findings of secondary negative effects. Moreover, the court concludes that the cities in the studies, although geographically distant, are major urban areas such as Atlanta, Georgia which have a history of adult entertainment establishments. Second, plaintiffs' attempt to negate the value of the outside studies because they do not address nude entertainment and alcohol in combination is also unconvincing. The study in Indianapolis addresses both the negative secondary effects of nude entertainment and those of

establishments serving alcohol. As the court noted in *Sammy's*, the "Supreme Court has recognized that any form of nudity coupled with alcohol in a public place begets undesirable behavior." 140 F.3d at 997 (quoting New *York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718, 101 S.Ct. 2599 (1981)).

A. *Procedural due process*

The due process clause of the Fourteenth Amendment protects individuals against governmental deprivations of "life, liberty or property" without due process of law. U.S. Const. Amend. XIV, §1. "Ordinarily, due process of law requires [notice and] an opportunity for some kind of hearing prior to the deprivation of a significant property interest." *Halverson v. Skagit County*, 42 F.3d 1257, 1260 (9th Cir. 1994) (quoting *Sinaloa Lake Owners Ass' n v. City of Simi Valley*, 882 F.2d 1398, 1405 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990)). However, if the court finds that the governmental conduct is legislative, generally, the property owner has no procedural due process rights. *County Line Joint Venture v. City of Grand Prairie, Texas*, 839 F.2d 1142, 1144 (5th Cir. 1988).

1. *Legislative or adjudicative*

Plaintiffs contend that defendants' passing of the amendment to section 18-76 operates as an adjudication because its enactment was predicated on fact-findings relating specifically to plaintiffs and therefore they are entitled to greater due process. Plaintiffs also assert that under the zoning scheme, they own the only sites available for adult entertainment in unincorporated Fulton County and therefore defendants must have realized that the ordinance once enacted would impact the plaintiffs uniquely and adversely.

To determine whether a particular governmental action is legislative or adjudicatory, courts have focused on the "character of the action, rather than its label." *Halverson*, 42

F.3d at 1260 (quoting *Harris v. County of Riverside*, 904 F.2d 497, 501 (9th Cir. 1990)). In this action, the court finds that the amendment to section 18-76 applies generally to all adult entertainment establishments which exist now or are created in the future. The Board clearly relied not on the more specific study of plaintiffs' businesses, but on the studies of negative secondary effects in other metropolitan areas. Further, Angela Parks, Deputy Director of Environment and Community Development, has testified in an affidavit that in her opinion numerous sites are available in Fulton County, Georgia for other adult entertainment establishments and therefore there is evidence that plaintiffs are not the only parties potentially affected by the new ordinance. Accordingly, the court finds that defendants' actions in passing the amendment to section 18-76 was legislative not adjudicative.

2. *Vested property right*

Even if the court were to hold that the amendment to section 18-76 was an adjudicative action, procedural due process rights only follow if plaintiffs can establish a vested property right under federal or state law and a failure to grant sufficient due process in light of any such right. *See County Line*, 839 F. 2d at 1144.

In *Goldrush II v. City of Marietta*, 267 Ga. 683, 696 (1997), the Georgia Supreme Court addressed whether an almost identical ordinance enacted by the city of Marietta prohibiting the sale and consumption of alcohol in establishments with live nude dancing was constitutional under both federal and state law. As the plaintiffs in *Goldrush II*, plaintiffs in this action assert that they have a vested right to continue to offer adult entertainment and alcohol based on Fulton County's past practice of annually issuing licenses to them. In *Goldrush II*, the court held that plaintiffs did not have a vested right in the renewal of their licenses as they were "not exempted from the exercise of the city's police

power by its elected officials to further an important governmental interest." *Id.* at 697. The court concluded that plaintiff's reliance upon the past renewal of their licenses amounted only to a "unilateral expectation." *Id.*

After reviewing the record, as well the relevant law, the court finds that plaintiffs do not have a vested right in the renewal of their licenses. Although Fulton County has renewed plaintiffs' respective licenses for several years, section 18-42 of Article II of Fulton County's Code of Ordinances regulating adult entertainment establishments requires that annual registration "shall be conducted in accordance with the terms of this article." Thus, as in *Goldrush II*, plaintiffs do not have a vested right in the law never changing and are not exempt from the county's legitimate exercise of its police power in the furtherance a substantial governmental interest. The court therefore finds that plaintiffs do not have a protectible property interest in the renewal of their licenses under the facts of this case.

As the court holds that plaintiffs do not have a vested property right in the renewal of their licenses, plaintiffs' *de facto* condemnation claim and request for just compensation pursuant to the Fifth and Fourteenth Amendment must also fail. U.S. Const., amend. V. *See also, United States v. Jim*, 409 U.S. 80, 93 S.Ct. 261 (1973) (finding that plaintiffs did not have a constitutionally protected property right and therefore statute did not serve as an unconstitutional taking)). As plaintiffs concede that their claim labeled "intentional infliction of economic harm" is "basically tied to the condemnation theory," that claim is also without merit.

3. *Sufficient due process*

Moreover, the court also finds that plaintiffs were in fact granted certain due process at the November 19, 1997 public hearing. Plaintiffs' counsel were given notice of the proposed legislation and were allowed fifteen (15) minutes to state their concerns as well as permitted to submit their own

studies and affidavits regarding the alleged negative secondary effects of alcohol and live nude entertainment. Plaintiffs do not cite, and the court does not find, any supporting authority mandating that this opportunity was not sufficient for purposes of due process under these facts. Thus, the court finds that plaintiff's claim of a lack of procedural due process fails as a matter of law.

B. *Prior restraint*

According to plaintiffs, Fulton County's licensing ordinance for adult entertainment establishments serves as an invalid prior restraint because it (1) fails to require prompt decisions; (2) fails to require prompt judicial review; and (3) grants unbridled discretion to delay permission for the license.

Defendants respond that this is the first time plaintiffs have raised this argument and that as plaintiffs failed to present this challenge to the licensing scheme before the Fulton County Board of Commissioners, it is precluded from review by this court.

The licensing scheme which plaintiffs now attack is contained in separate sections of the code, sections 18-111 and 18-112, which were last amended in 1992. No part of the licensing regulation itself was a part of the most recent amendment to section 18-76, "Rules for operation," addressing the prohibition of the sale of alcohol in adult entertainment establishments. Plaintiffs' original complaints and mandatory disclosures only addressed section 18-76 and the 1997 amendment to that section. Moreover, at the second public hearing on December 17, 1997, plaintiffs limited their arguments to the new amendment to section 18-76, contending that there was no probative evidence of the existence of negative secondary effects, and never mentioned the licensing part of the statute. Thus, the court finds that plaintiffs' challenge to the licensing scheme in sections 18-

111 and 18-112 is a new claim which is raised for the first time in their response to defendants' motion for summary judgment. That response, filed more than fifteen months after commencement of this suit, is unaccompanied by either a motion to amend the pleadings or any reason justifying an amendment. Accordingly, the court will not consider plaintiffs' prior restraint claims as they relate to sections 18-111 and 18-112. *See Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1050 n.5 (9th Cir.1987); *Baker v. Penn Mutual Life Insurance Co.*, 788 F.2d 650, 656 (10th Cir. 1986); *Ross v. Houston Independent School District*, 699 F.2d 218 (5th Cir. 1983); *Barnes v. Burger King Corp.*, 932 F.Supp. 1420, 1429 (S.D. Fla. 1996).

C. *Obligations of contract*

Plaintiffs Flashers and Fannies contend that the ordinance impairs its contract with its landlord for the lease of the premises. Specifically, plaintiffs' leases for the two adult entertainment establishments state that the property shall be used for a topless nudity bar and for no other purpose and that plaintiffs are required to maintain their liquor license. Neither plaintiff Flanigan's nor CEEDA who reference Flashers' brief have attached their lease in support of this argument.

The United States Constitution provides that "no State shall. . . pass any Law impairing the Obligation of Contracts. . ." U.S. Const. Art. I, § 10, cl. 1. In evaluating a Contracts Clause claim, the court must determine whether the state law operates as a substantial impairment of a contractual relationship and if so, whether the impairment is necessary to meet an important governmental interest

> [I]t is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States. "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from

> exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, 98 S. Ct. 2716, 2722 (1978) (quoting *Manigault v. Springs*, 199 U.S. 473, 480, 26 S. Ct. 127, 130 (1905)).

As the court has held above, Fulton County's amendment to section 18-76 of its county ordinance regulating adult entertainment establishments is a valid exercise of its police power. Thus, even assuming plaintiffs Flashers and Fannies have shown that the ordinance would in fact impair their lease contracts, the court finds such impairment is necessary to promote a substantial governmental interest.

Accordingly, the court GRANTS defendants' motion for summary judgment [docket no. 8-1]. The court notes that plaintiffs fail to address their claim for intentional interference with business relations and therefore this claim is considered abandoned. The court further finds that plaintiffs do not appear to make a claim of bill of attainder in either their complaints or their responses to defendants' motion for summary judgment and therefore defendants' argument as to such a claim is irrelevant and will not be considered by the court.

III Summary

The court GRANTS defendants' motion for summary judgment (Case No. 98-cv-2441-GET) [docket no. 10-1] (Case No. 98-cv-2904-GET) [docket no. 8-1] (Case No. 98-cv-2910) [docket no. 11-1] .

SO ORDERED, this 3 day of February, 2000.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL, Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:98-cv-2904-GET

6420 ROSWELL ROAD, INC., *et al.*
Plaintiff,

VS.

FULTON COUNTY, GEORGIA, *et al.*,
Defendant.

JUDGMENT

This action having come before the court, Honorable G. Ernest Tidwell, United States District Judge, for consideration of defendants' motion for summary judgment, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendants recover the costs of this action, and the action be, and the same hereby, is dismissed.

Dated at Atlanta, Georgia, this 4th day of February, 2000.

LUTHER D. THOMAS.
Clerk Of Court

By: Illegible
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
February 4, 2000

Luther D. Thomas
Clerk of Court

By: /s/ Illegible
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:98-cv-2441-GET

FLANIGAN'S ENTERPRISES, INC. of GEORGIA,
Plaintiff,

vs.

FULTON COUNTY, GEORGIA, *et al.*,
Defendant.

JUDGMENT

This action having come before the court, Honorable G. Ernest Tidwell, United States District Judge, for consideration of defendants' motion for summary judgment, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendants recover the costs of this action, and the action be, and the same hereby, is dismissed.

Dated at Atlanta, Georgia, this 4th day of February, 2000.

LUTHER D. THOMAS.
Clerk Of Court

By: Illegible
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
February 4, 2000
Luther D. Thomas
Clerk of Court
By: /s/ Illegible
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:98-cv-2910-GET

CEEDA ENTERPRISES, INC.,

Plaintiff,

VS.

FULTON COUNTY, GEORGIA, *et al.*,

Defendant.

JUDGMENT

This action having come before the court, Honorable G. Ernest Tidwell, United States District Judge, for consideration of defendants' motion for summary judgment, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendants recover the costs of this action, and the action be, and the same hereby, is dismissed.

Dated at Atlanta, Georgia, this 4th day of February, 2000.

LUTHER D. THOMAS.
Clerk Of Court

By: Illegible
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
February 4, 2000
Luther D. Thomas
Clerk of Court
By: /s/ Illegible
Deputy Clerk

APPENDIX C

[Filed Apr 23, 2001]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-11152-II

FLANIGAN'S ENTERPRISES, INC.
of GEORGIA, d.b.a. Mardi Gras,
Plaintiff-Appellant,

versus

FULTON COUNTY, GEORGIA, THE BOARD OF COMMISSIONERS of FULTON COUNTY, GEORGIA, MITCH SKANDALAKIS, individually and in his of official capacity as Commissioner of Fulton County, Georgia, NANCY BOXILL, GORDON JOYNER, ROBERT FULTON, in their individual capacities and as Commissioners of FULTON COUNTY, *et al.*,
Defendants-Appellees,

6420 ROSWELL ROAD, INC., a Georgia Corporation, d.b.a. Flashers, HARRY FREESE, individually and as Licensee for Flashers, FANNIES, INC. d.b.a. Fannies, WILLIAM H. PARKS, JR., individually and as owner of Fannies
Plaintiffs- Appellants,

versus

FULTON COUNTY, THE BOARD OF COMMISSIONERS OF FULTON COUNTY, GEORGIA, MITCH SKANDALAKIS, individually and in his official capacity as Chairman of the Board of Commissioners of Fulton County, Georgia, NANCY BOXILL, GORDON JOYNER, *et al.*,
Defendants-Appellees,

CEEDA ENTERPRISES, INC., d.b.a.
Riley's Restaurant & Lounge,

Plaintiff-Appellant,

versus

FULTON COUNTY, GEORGIA, THE BOARD OF COMMISSIONERS of FULTON COUNTY, GEORGIA, MITCH SKANDALASKIS, Chairman, individually and in his official capacity as a commissioner of Fulton County, NANCY BOXILL, individually and in her official capacity as a commissioner of Fulton County, EMMA I. DARNELL, individually and in her official capacity as commissioner of Fulton County, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION (S) FOR REHEARING
AND PETITION (S) FOR REHEARING EN BANC

(Opinion____, 11th Cir., 19____, ___F.2d___).

Before: DUBINA, FAY and COX, *Circuit Judges.*

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Peter T. Fay
PETER T. FAY
UNITED STATE CIRCUIT JUDGE

APPENDIX D

ORDINANCE AMENDING SECTION 18-76, CODE OF LAWS OF FULTON COUNTY, GEORGIA, TO PROHIBIT THE SERVING, OFFERING, OR CONSUMPTION OF ALCOHOLIC BEVERAGES IN ADULT ENTERTAINMENT FACILITIES

WHEREAS, Article III, Section VI, Paragraph VII, Constitution of the State of Georgia, delegates authority to counties and municipalities ". . . . for the purpose of regulating, restricting, or prohibiting the exhibition of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages . . ."; and

WHEREAS, the Supreme Court of Georgia, on March 17, 1997, in the consolidated cases of *Goldrush II, et. al., v. City of Marietta, et al.*; *Varsalona's Italian Restaurant d/b/a Boomer's et al. v. City of Marietta, et al.; and Tudor d/b/a Cyprus Lounge v. City of Marietta, et al.*, 267 Ga. 683 (1997), upheld a City of Marietta, Georgia, ordinance which prohibits the serving or consumption of alcoholic beverages in adult entertainment establishments; and

WHEREAS, the United States Supreme Court, in October, 1997, refused to grant certiorari in an appeal of the said consolidated cases; and

WHEREAS, the Georgia Supreme Court. in *Chambers v. Peach County*, 266 Ga. 318 (1996), has previously held that, before enacting an ordinance to combat undesirable secondary effects of adult entertainment, a legislative body is required to consider specific evidence of the undesirable secondary effects that it reasonably believes relevant to the problems it seeks to address by passing the ordinance; and

WHEREAS, in a public hearing held November 19, 1997, the Board of Commissioners heard testimony and received

studies from its staff, the public, and from representatives of the adult entertainment industry concurring negative secondary effects connected with adult entertainment facilities where alcoholic beverages are consumed, and live nude, or partially nude, performances are presented; and

WHEREAS, based upon the experience of other urban counties and municipalities, which experiences the Board of Commissioners finds are relevant to the problems faced by Fulton County, Georgia, and which do not vary greatly among generally comparable communities within this country, the Board of Commissioners finds that public nudity, under certain circumstances, particularly circumstances related to the sale and consumption of alcoholic beverages in adult entertainment facilities offering live entertainment, begets criminal behavior and tends to create undesirable community conditions; and

WHEREAS, among the undesirable community conditions identified with live nude entertainment and alcohol are depression of property values in the surrounding neighborhood, increased expenditure for the allocation of law enforcement personnel to preserve law and order, increased burden on the judicial system as a consequence of the criminal behavior herein above described, and acceleration of community blight by the concentration of such establishments in particular areas; and

WHEREAS, the limitation of nude conduct in establishments licensed to sell alcohol for consumption on the premises is in the public welfare, and it is a matter of governmental interest and concern to prevent the occurrence criminal behavior and undesirable community conditions normally associated with establishments which serve alcohol and also allow or encourage nudity; and

WHEREAS, it is the. intent of the Board of Commissioners to enact a carefully tailored regulation to minimize the

negative secondary effects of the serving and consumption of alcoholic beverages at adult entertainment facilities; and

WHEREAS, it is not the intent of the Board of Commissioners, in enacting any such ordinance amendment, to deny to any person rights to speech or expression protected by the United States or Georgia Constitutions, nor it is the intent to deny or restrict the rights of any adult to obtain or view any sexually oriented performance or materials protected by the United States or Georgia Constitutions, but to adopt a content neutral measure to address the secondary effects of adult entertainment establishments where alcoholic beverages are served or consumed; and

WHEREAS, this Ordinance is enacted to further the health, safety, and welfare of the citizens of Fulton County.

NOW, THEREFORE, BE IT ORDAINED by the Board of Commissioners of Fulton County, Georgia, that:

Section 1. Amendment to Section 18-76. Section 18-76, Code of Laws of Fulton County (1997), is hereby amended to read as follows:

Sec. 18-76. Rules for operation.

Any person, firm, partnership, or corporation licensed hereunder shall comply with the following rules and regulations pertaining to the operation of the adult entertainment establishment:

(1) No licensee shall operate between the hours of 4:00 a.m. and 9.00 a.m.

(2) No person under the age of 18 shall be permitted on the premises.

(3) No patron shall be permitted to fondle or caress any performers, nor shall any performer be permitted to fondle or caress a patron.

(4) No tips for performers shall be placed on the person of the performer except by hand to hand.

(5) All performers of adult entertainment shall be restricted to fixed stages, and no patron shall be permitted on such stages. Fixed stage shall be defined as a raised floor area designed exclusively for use by performers.

(6) The license shall be displayed in a prominent place on the premises at all times.

(7) No licensée shall permit any alcoholic beverages to be served, offered, or consumed on the premises.

Violations of these rules and regulations may result in the revocation of the license.

Section 2. Severability. It is declared to be the intent of the Board of Commissioners that, if any section, subsection, sentence, clause, phrase, or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof.

Section 3. Conflict. Any Ordinance or part thereof in conflict with this Ordinance or any part hereof is hereby repealed to the extent of the conflict.

Section 4. Inclusion into the Code. The provisions of this Ordinance shall be included and incorporated within the Code of Laws of Fulton County (1997), and may be renumbered or relettered to accommodate such inclusion.

Section 5. Effective Date. This Ordinance shall take effect on January 1, 1998; provided, however, that it shall not take effect until December 31, 1998, for adult entertainment facilities holding adult entertainment licenses on December 17, 1997.

ENACTED by the Board of Commissioners of Fulton County, Georgia, this seventeenth day of December, 1997.

BOARD OF COMMISSIONERS
OF FULTON COUNTY,
GEORGIA

By: /s/ Mitch J. Skandalakis
MITCH J. SKANDALAKIS,
Chairman

ATTEST:

/s/ Justine Boyd
JUSTINE BOYD, Clerk

APPROVED AS TO FORM & LEGALITY:

/s/ Gerry Clark
GERRY CLARK
FOR Linda T. Walker, Acting County Attorney